

REMARKS

Applicant has carefully reviewed the Office Action mailed April 10, 2007 and offers the following remarks to accompany the above amendments.

Claims 1-27 are pending in the present application. Claims 6-8 and 15-18 are cancelled. Claims 28-50 are added. Accordingly, claims 1-5, 9-14, and 19-50 remain pending.

Claims 1-27 were objected to for informalities. Applicant has cancelled claims 6-8 and 15-18 and has amended claims 1-5, 9-14, and 19-27 to correct the informalities. No new subject matter has been added to claims 1-5, 9-14, and 19-27. Support for the claim amendments is found within original claims 4 and 5, and within the cancelled claims 6-8 and 15-18. Additionally, support is also found within the specification and drawings. (See Figure 1; and Specification, page 3, lines 15-19, and page 5, line 13 through page 6, line 13). Accordingly, the objection of claims 1-5, 9-14, and 19-27 for informalities should be withdrawn.

Claims 1-27 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. Applicant respectfully traverses. Applicant has cancelled claims 6-8 and 15-18 and has amended claims 1-5, 9-14, and 19-27 to place these claims in proper claim format and to more particularly point out and distinctly claim the subject matter. Accordingly, the rejection of claims 1-5, 9-14, and 19-27 under 35 U.S.C. § 112, second paragraph, should be withdrawn.

Claims 1-24 and 27 were provisionally rejected on the grounds of non-statutory obviousness-type double patenting as being unpatentable over claims 1, 2, 4-12, and 14-20 of copending application no. 10/802,456. Claim 1 was also provisionally rejected on the grounds of non-statutory obviousness-type double patenting as being unpatentable over claims 1, 11, 13, and 17-24 of copending application no. 10/814,035. Applicant respectfully traverses. Applicant has cancelled claims 6-8 and 15-18 and has amended claims 1-5, 9-14, and 19-27 to distinguish over claims 1, 2, 4-12, and 14-20 of copending application no. 10/802,456 and to distinguish claim 1 over claims 1, 11, 13, and 17-24 of copending application no. 10/814,035. Accordingly, the provisional non-statutory obviousness-type double patenting rejections of claims 1-5, 9-14, 19-24, and 27 should be withdrawn.

Claim 1 was rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. Applicant respectfully traverses. Applicant has amended claim 1 to recite the steps of the method. Accordingly, the rejection of claim 1 under 35 U.S.C. § 101 should be withdrawn.

Claim 1 was rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,076,281 to Gavish (hereinafter “Gavish”). Applicant respectfully traverses. For the Patent Office to prove anticipation, each and every element of the claims must be present in the reference. Furthermore, the elements of the reference must be arranged as claimed. MPEP § 2131.

Prior to addressing the merits of the rejection, Applicant offers the following brief summary of the present invention as claimed. The present invention relates to a method and system for the composition and creation of music. A musical tempo is defined. The musical tempo is based upon a heart rate variability cycle of a human. A fundamental interval of the musical tempo is approximately half of a period of the heart rate variability cycle. The musical tempo includes a plurality of secondary intervals, which is identified within the musical tempo by division of the fundamental interval. A primary set of the secondary intervals is defined by even division of the fundamental interval. As such, each subsequent division of the fundamental interval to yield an integer result provides another of the primary set of secondary intervals. A musical composition is created based upon the musical tempo and musical breathing cues are provided within the musical composition based upon the fundamental interval and the plurality of secondary intervals to allow a listener to synchronize their heart rate variability cycle with their breathing cycle.

In contrast, the Gavish reference teaches a device and method for modulating naturally occurring rhythmic body activity. A biorhythm modulator, including a sensor which monitors a biorhythmic activity, is used to produce sound patterns representing the monitored activity. A respiratory drive control allows the user to adjust a pattern sequencer to increase or decrease the rhythm of the sound patterns produced relative to the monitored biorhythm. A controller compares the phase difference between the monitored biorhythm and the produced sound patterns as adjusted by the user to determine the capability of the produced sound patterns to follow the monitored biorhythm. If the controller determines that the produced sound patterns cannot follow the monitored biorhythm, the controller restarts the pattern sequencer with an adjusted phase. Figures 3A and 3B illustrate inhalation and exhalation relationships in conjunction with sound pattern production and show that the inhalation portion of the sound pattern generation is significantly shorter than the exhalation portion. The Gavish reference teaches that sound patterns 3 and 4 within Figure 3B are randomly generated. As such, Applicant respectfully submits that there is no teaching or suggestion within the Gavish reference of a heart rate variability cycle. Additionally, there is no fundamental interval taught

or suggested within the Gavish reference that is approximately half of a period of the heart rate variability cycle. Accordingly, there is no teaching or suggestion within the Gavish reference of synchronizing a heart rate variability cycle with a musical tempo. In contrast, the Gavish reference teaches random generation of sound patterns.

Claim 1 has been amended to recite, among other things, “defining a musical tempo based on a heart rate variability cycle of a human, wherein a fundamental interval of the musical tempo is approximately half of a period of the heart rate variability cycle . . .” Claim 1 further recites that “the musical tempo includes a plurality of secondary intervals defined by division of the fundamental interval . . .”

Applicant respectfully submits that the Gavish reference does not teach a musical tempo as claimed. Applicant finds no teaching or suggestion within the Gavish reference of a fundamental interval of a musical tempo which is based on a heart rate variability cycle of a human. Furthermore, there is no teaching or suggestion within the Gavish reference of a plurality of secondary intervals defined by division of the fundamental interval. Accordingly, the rejection of claim 1 under 35 U.S.C. § 102(b) should be withdrawn for at least these reasons.

Claims 1-27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Application Publication No. 2004/0225340 A1 to Evans (hereinafter “Evans”) in view of Gavish. Applicant respectfully traverses. For the Patent Office to combine references in an obviousness rejection, the Patent Office must establish *prima facie* obviousness by showing where each and every element is taught or suggested in the combined references. MPEP § 2143.03.

Regarding the rejection of claim 1, Applicant has discussed several deficiencies of the Gavish reference above. The Evans reference does not cure these deficiencies. Applicant respectfully submits that at least the musical tempo, including the plurality of secondary intervals, as claimed, is not taught or suggested by the Gavish reference and the Evans reference, either alone or in combination. Accordingly, the Patent Office has not established *prima facie* obviousness because it has not shown where each and every element is taught or suggested in the combined references and the rejection of claim 1 under 35 U.S.C. § 103(a) should be withdrawn.

Claims 2-5, 9-14, and 19-27 depend, either directly or indirectly, from claim 1. Accordingly, the rejection of claims 2-5, 9-14, and 19-27 should be withdrawn for at least the same reasons as claim 1. Applicant reserves the right to provide additional arguments against the rejection of claims 2-5, 9-14, and 19-27 in the future. Applicant respectfully submits that claims 1-5, 9-14, and 19-27 are in condition for allowance and notice of the same is respectfully requested at the earliest possible date.

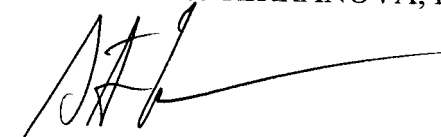
Claims 28-50 have been added. No new subject matter is added by these amendments. Claims 28-50 include subject matter claimed within claims 1-5, 9-14, and 19-27. Applicant respectfully submits that claims 28-50 are in condition for allowance and notice of the same is respectfully requested at the earliest possible date.

The present application is now in condition for allowance and such action is respectfully requested. The Examiner is encouraged to contact Applicant's representative regarding any remaining issues in an effort to expedite allowance and issuance of the present application.

Respectfully submitted,

WITHROW & TERRANOVA, P.L.L.C.

By:

A handwritten signature in black ink, appearing to read 'S. N. Terranova', with a long horizontal flourish extending to the right.

Steven N. Terranova
Registration No. 43,185
100 Regency Forest Drive, Suite 160
Cary, NC 27518
Telephone: (919) 238-2300

Date: June 22, 2007

Attorney Docket: 1119-008